Supreme Court, U.S.
FILED
JUN 1 1994
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(4)

No. 93-1972

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ANDREW LEO LOPEZ,

Petitioner,

vs.

DANIEL J. BEHLES, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITIONER'S PETITION FOR *WRIT OF CERTIORARI*

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27pp

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-110-JB/RWM

DANIEL BEHLES, Trustee for American Ready Mix, Inc., and Albuquerque Sand & Gravel, Inc., and WESTERN BANK,

Defendant-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court upon appellant Andrew Leo Lopez's appeal from an Order of the Bankruptcy Court approving the payment of professional fees to accountant Harold Field, who was hired by the bankruptcy estate. See January 11, 1991 Order authorizing fees incurred by the accountant. After review of the memoranda of the parties, the record on appeal and the applicable law, the Court concludes that the Order of the Bankruptcy Court should be affirmed.

Appellant claims that the accountant's fees

should not have been authorized for several reasons. First, appellant claims that the accountant's fee, although a reasonable hourly rate, was not reasonable in this instance because the same services could have been obtained from a company offering temporary accountant's services. Second, appellant claims that the accountant charged the estate for work that exceeded the scope of his employment. Third, appellant claims that the accountant's actions were incompetent and violated ethical standards for accountants. Fourth, appellant claims that the accountant made negligent misrepresentations in performing his professional duties.

This Court must review the Bankruptcy Court's factual findings under a clearly erroneous standard; the legal determinations are reviewed de novo. *Re Unioil, Inc.*, 962 F.2d 988, 990 (10th Cir. 1992); *In re Burkart Farm & Livestock*, 938 F.2d 1114, 1115 (10th Cir. 1991). All of appellant's assertions attack the

findings of fact made by the Bankruptcy Court. Therefore this Court must find clear error in order to reverse the Bankruptcy Court.

Although plaintiff made numerous conclusory allegations in his briefs to this Court, and at the hearing before the Bankruptcy Court, none of the allegations are supported with positive evidence. In contrast, the findings made by the Bankruptcy Court are supported by ample evidence in the record. Without belaboring each allegation made by appellant, suffice it to say that the record clearly supports the Bankruptcy Court's findings are not clearly erroneous, and they will not be disturbed.

Appellant also argues in his reply brief that because the Trustee has a conflict of interest he must be disqualified, and should disgorge all fees and expenses paid to him by the debtor's estate. It does not appear that this issue was raised before the Bankruptcy Court. Except for jurisdictional issues, claims not presented to the court below may not be

considered by this Court upon appeal. *Matter of Kroner*, 953 F.2d 317, 319 (7th Cir. 1992); see also *In re Edmonds*, 924 F.2d 176, 181 n. 3 (10th Cir. 1991). This Court declines to consider appellant's arguments regarding the Trustee.

IT IS THEREFORE ORDERED that the Order of the United States Bankruptcy Court for the District of New Mexico authorizing the accountant's fees is affirmed.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-482-SC/RWM

DANIEL BEHLES, TRUSTEE, for
American Ready Mix, Inc., and
Albuquerque Sand and Gravel and
U. S. BANKRUPTCY COURT,

Defendants-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court upon Appellant Andrew Leo Lopez' appeal from an Order of the Bankruptcy Court denying Appellant's Motion to Recuse or Disqualify the Bankruptcy Judge.[1] After review of the record on appeal, the memoranda of the parties and the applicable law, the Court concludes that the Order of the Bankruptcy Court should be affirmed.

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[1] This cause number consists of two distinct appeals from Bankruptcy Orders. This Memorandum Opinion and Order relates to the recusal issue. A separate Memorandum Opinion and Order will be entered relating to the "Val & Sons" issue.

Appellant, an accountant formerly employed by the debtor, appeals the Bankruptcy Judge's refusal to recuse himself. Some background facts will clarify Appellant's argument. At a hearing on a motion for conversion from a Chapter 11 reorganization to a Chapter 7 bankruptcy, held on October 23, 1990, counsel for the New Mexico Department of Taxation introduced into evidence a letter written by Appellant to the New Mexico Department of Taxation and Revenue. Apparently the debtor had been remiss in making various state and federal tax payments. See Partial Transcript of hearing In re: American Ready Mix, Inc., No. 11-89-02832 RA, October 23, 1990, at 9-11, 78, 86, 103, 130-31. The letter in question, although apparently not before the Court, appears to have been an accusation by Appellant that the New Mexico Department of Taxation and Revenue was responsible for the death of debtor's chief accountant because the State accused the accountant of failing to file tax returns. See

transcript of April 25, 1991, hearing, at 11. The Department of Taxation and Revenue's Motion for Conversion was ultimately granted. See Order of Conversion, entered October 24, 1990.

On April 18, 1991 Appellant filed a Motion to Recuse or Disqualify Presiding Judge. The motion stated as grounds, in part, that counsel for the debtor asked Appellant not to appear at the hearing on the Motion to Stay the Order to convert because Appellant's presence would influence the Court to rule against debtor. Appellant claims that the Bankruptcy Judge was biased against Appellant's employer, the debtor, because of the letter that Appellant wrote to the New Mexico Department of Taxation and Revenue. See Transcript of January 11, 1991 hearing at 27. Appellant claims that this bias resulted in an erroneous order converting the reorganization into a Chapter 7 bankruptcy. On May 2, 1991 the Bankruptcy Judge denied the motion for recusal, and plaintiff appealed to this Court.

28 U.S.C.§ 455(b)(1) provides that a justice, judge or magistrate of the United States shall disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." The standard of appellate review on questions of recusal is whether the judge abused his discretion in not disqualifying himself. ***United States v. Probst***, 792 F.2d 111 (8th Cir. 1986); ***United States v. Bonilla***, 626 F.2d 177 (1st Cir. 1980); ***United States v. Haldeman***, 559 F.2d 31, 139 n. 359 (D.C. Cir.); ***cert denied***, 431 U.S. 933 (1976).

Ordinarily the personal bias must exist outside the lawsuit. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." ***United States v. Grinnell Corp.***, 384 U.S. 563, 583 (1966). It is clear that a judge need not step down merely because he has made

remarks critical of, or has otherwise expressed displeasure with, a party or a lawyer. ***United States v. Troxell***, 887 F.2d 830 (7th Cir. 1989) (recusal not required where defendant claimed she overheard an unidentified person say the judge must be angry, where no demonstration of actual bias or prejudice); ***United States v. Burt***, 765 F.2d 1364 (9th Cir. 1985). "[A]dverse rulings against a litigant cannot in themselves form the appropriate grounds for disqualification." ***Green v. Dorrell***, 969 F.2d 915, 919 (10th Cir. 1992).

In this case, any displeasure that the Bankruptcy Judge expressed was clearly the result of reading the letter introduced into evidence during the October 23, 1990 hearing. Thus, the alleged bias was not from an extrajudicial source. It is clear as well that the judge's rulings on the merits were supported by the other evidence adduced at the hearings, and were not based upon any personal animosity towards appellant. The Bankruptcy Judge

therefore did not abuse his discretion in refusing to recuse himself.

IT IS THEREFORE ORDERED that the Order of the United States Bankruptcy Court for the District of New Mexico denying appellant's motion to recuse or disqualify presiding bankruptcy judge is AFFIRMED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-482-JP/RWM

DANIEL BEHLES, Trustee, for American Ready Mix, Inc., and Albuquerque Sand and Gravel, Inc., VAL & SONS, INC., VALENTIN TRUJILLO, and WESTERN BANK.

Defendants-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court upon Appellant Andrew Leo Lopez' appeal from an Order of the Bankruptcy Court lifting the automatic stay, thereby allowing creditor Val & Sons to foreclose on its mortgage on certain business premises of debtor. See Stipulated Order Lifting Automatic Stay, filed May 2, 1991.[1]

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[1] This cause number consists of two distinct appeals from Bankruptcy Orders. This Memorandum Opinion and Order relates to the lifting of the stay allowing Val & Sons to foreclose on a mortgage. A separate Memorandum Opinion and Order will be entered relating to the recusal issue.

After review of the memoranda of the parties and the applicable law, the Court concludes that the Order of the Bankruptcy Court should be affirmed.

Appellant raises several issues in this appeal.[2] Some of them relate directly to the lifting of the stay which allowed Val & Sons to foreclose upon its mortgage, and others address peripheral matters. Plaintiff first complains that he did not receive adequate notice of the hearing on the lifting of the automatic stay. Plaintiff was present nonetheless, because another hearing in the same case was scheduled immediately after the hearing in question. Plaintiff doesn't claim that the lack of adequate notice prejudiced him in any way. Indeed, the fact that Plaintiff was present at the hearing eliminates any prejudice that Plaintiff might have suffered by not receiving

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[2] The Court assumes that the thrust of Plaintiff's appeal is the above-mentioned Order lifting the stay, although Plaintiff does not cite to the Order or refer to it directly.

proper notice. With respect to Plaintiff's claim that all parties in interest should have been given notice of the hearing, the Court notes that Plaintiff does not represent the class of interested parties, and therefore has no standing to raise this issue.

Plaintiff recognizes that the fact that the property has already been sold may lead to the conclusion that the matter is moot. However, Plaintiff claims that because the Bankruptcy Court made no determination that Val & Sons was a good faith purchaser, and because there was no hearing on the value of the asset, this court should either remand the matter to the Bankruptcy Court or should hold the hearings itself.

If a stay of an order of a bankruptcy court is not obtained pending appeal, and assets are sold to satisfy the claims of a creditor, the appeal from the lifting of the automatic stay is generally moot. See In re Sun Valley Ranches, Inc., 823 F.2d 1373, 1374-75 (9th Cir. 1987).

The Court recognized an exception to the general rule where the sale of real property is sold to a creditor who is a party to the appeal, and the debtor appeals. Id. The exception does not apply in this case because the trustee agreed to the entry of the Order lifting the automatic stay. See Stipulated Order Lifting Automatic Stay, filed May 2, 1991.

As explained in this Court's December 30, 1991 Memorandum Opinion and Order dismissing Plaintiff's appeal in the companion case Civil No. 91-532 JP/RWM, Bankruptcy Rule 8005 allows an aggrieved party to seek a stay of an order of a bankruptcy court pending appeal. The purpose of Rule 8005 is to protect the interest of good faith purchasers. In re Suchy, 786 F.2d 900, 902 (9th Cir. 1985). Plaintiff claims that the Bankruptcy Court made no finding regarding the good faith of the purchaser, or of the value of the property, yet Plaintiff fails to assert that these issues were raised before the Bankruptcy Court. Plaintiff admits that he was present at

the hearing, yet there is no evidence that he presented these arguments to the Bankruptcy Judge. It is axiomatic that, except for jurisdictional issues, claims not presented to the Court below may not be considered by a court upon appeal. **Matter of Kroner**, 953 F.2d 317, 319 (7th Cir. 1992); **see also In re Edmonds**, 924 F.2d 176, 181 n.3 (10th Cir. 1991).

Finally, Plaintiff claims that the Trustee in the bankruptcy case had conflicts of interest, and therefore was not disinterested in the outcome of the proceedings. Plaintiff fails to support these assertions with any facts supported by the record or any other evidence. Plaintiff's allegations regarding the Trustee are not well-taken.

IT IS THEREFORE ORDERED that the Order of the United States Bankruptcy Court for the District of New Mexico lifting the automatic stay regarding Val & Sons is affirmed.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-532-JP/RWM

DANIEL BEHLES, Trustee, for American Ready Mix, Inc., and Albuquerque Sand and Gravel, Inc., VAL & SONS, INC., VALENTIN TRUJILLO, and WESTERN BANK.

Defendants-Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon defendant-appellee Western Bank of Albuquerque, New Mexico's Motion to Dismiss Appeal of Andrew Leo Lopez, filed June 24, 1991. Before reaching the merits of this motion, it is necessary for the Court to clarify certain aspects of this case and of related case Civil No. 91-110-JP/RWM, styled In re: Andrew Leo Lopez, MBA, CPA v. Daniel Behles, et al.

91-110-JP/RWM

The appeal numbered 91-110-JP/RWM is an

appeal of the Bankruptcy Court's Order to pay accountant's fees. On June 13, 1991, I entered an Order in 91-110 striking certain filings by Andrew Leo Lopez, a creditor in the underlying bankruptcy. My Order struck the Emergency Motion Pursuant to Federal Rules of Civil Procedure 76 and Bankruptcy Rule 8005 for Stay of United States Bankruptcy Court Orders and Motion to Consolidate Appeals under 8011. I struck these filings because they related to an Order entered by the Bankruptcy Court on May 21, 1991 granting the Motion to Approve Stipulated Agreement Terminating Automatic Stay, which Order was not appealed in 91-110. The filings did not relate to the appeal in 91-110 regarding accountant's fees. The Order to which Plaintiff's filings related allowed Western Bank, a creditor, to foreclose on its security interest in certain collateral. On page 2 of my Order I stated that "if Mr. Lopez desires to proceed with an appeal from the Order entered May 21, 1991 by the Bankruptcy Judge terminating

the automatic stay as to Western Bank of Albuquerque, he may do so if he complies with D.N.M L.R.-Bk 9 provided the time for filing an appeal has not yet expired." At the time I entered this Order, I was unaware that Mr. Lopez had already filed his appeal on the Western Bank issue. The case was No. 91-532, the instant case, which at that time was assigned to Judge Mechem.

On June 24, 1991, several days after entry of my Order, Western Bank filed its Motion to Dismiss Appeal of Andrew Leo Lopez. Unfortunately, Western Bank filed the motion in 91-110, instead of in 91-532 M. On July 16, 1991, in considering Western Bank's Motion to Dismiss Appeal, and still unaware that 91-532 existed, I determined that Western Bank's Motion was moot because of my earlier Order striking Mr. Lopez' pleadings relating to Western Bank. After my Order was entered, I was advised of the appeal number 91-532 assigned to Judge Mechem. Judge Mechem transferred the case to me on

August 20, 1991.

After reviewing both files, it is apparent that Western Bank's Motion to Dismiss Appeal of Andrew Leo Lopez, filed June 24, 1991 in Civil No. 91-110-JP/RWM was in actuality a Motion to Dismiss that should have been filed in 91-532. Therefore, that part of my July 16, 1991 Order which dismissed Western Bank's Motion to Dismiss Appeal as moot is vacated and I will now consider the merits of the Motion to Dismiss as if it had been filed in 91-532-JP/RWM.

Motion to Dismiss

This appeal is from an order of the Bankruptcy Court approving the Motion to Approve Stipulated Agreement Terminating Automatic Stay, entered May 21, 1991. This Order allowed Western Bank of Albuquerque to proceed in its efforts to foreclose upon its security interests in certain collateral which secured an indebtedness owed to Western Bank by the debtor in the Bankruptcy. Although Mr. Lopez filed this appeal from that Order, he did not obtain

a stay of the Order from the Bankruptcy Court.[1] On May 29, 1991, Western Bank held a sale, and the collateral, mining equipment, was sold. Western Bank therefore seeks an Order dismissing this appeal on the grounds that the sale has already occurred, rendering this appeal moot. Mr. Lopez' response to Western Bank's arguments is that this Court "declined jurisdiction over this appeal", Western Bank's request for dismissal should be denied. See Reply to appellee's Memorandum Brief to Dismiss Appellant's Appeal, filed July 8, 1991. In

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[1] Mr. Lopez filed a Motion for a Stay, but filed it in 91-110, instead of in 91-532, which led to my Order striking the Motion. In addition, Mr. Lopez sought the stay from the District Court instead of from the Bankruptcy Court. See Bankruptcy Rule 8005. Rule 8005 requires that any motion for a stay pending appeal that is made to the district court "shall show why the relief ... was not obtained from the bankruptcy judge." Even if I had not stricken the Motion for being filed in the wrong file, I would have denied the Motion for failure to comply with Bankruptcy Rule 8005. See *In re Petrusch*, 14 B.R. 825 (N.D.N.Y. 1981), *affm'd*, 667 F.2d 297 (9th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982) (Court has power to stay Order of Bankruptcy Court as long as relief is first sought from Bankruptcy Court).

claiming that I had declined jurisdiction over the appeal, Mr. Lopez apparently refers to my June 13, 1991 Order striking his pleadings regarding the Western Bank appeal. As discussed above, however, I will consider the Motion to have been filed in the proper case, 91-532, and will rule upon the Motion to Dismiss on the merits.

Bankruptcy Rule 8005 provides that a motion for a stay of an order of a bankruptcy court pending appeal should be made to the bankruptcy court. Rule 8005 does not require the aggrieved party to seek a stay. ***In re Highway Truck Drivers & Helpers***, 888 F.2d 293, 297 (3rd Cir. 1989). However, if a stay of an appeal is not obtained, and assets are sold to satisfy the claims of a creditor, the appeal from the lifting of the automatic stay is moot unless it involves the sale of real property to a creditor who is a party on the appeal. **See *In re Sun Valley Ranches, Inc.***, 823 F.2d 1373, 1374-75

(9th Cir. 1987).[2]

The goal of Rule 8005 in requiring a stay is to protect the interests of good faith purchasers. *In re Suchy*, 786 F.2d 900, 902 (9th Cir. 1985). Plaintiff claims in his brief in chief, filed September 13, 1991, that this appeal should not be considered moot because the Bankruptcy Court failed to find that the purchaser of the collateral was a good faith purchaser. Although Mr. Lopez claims that "the [bankruptcy] Court ignored testimony that there may have been collusion among the parties to this transaction", id. at 3, Mr. Lopez fails to cite to the record in support of his assertion. Mr. Lopez also claims that his allegations of collusion are supported by the fact that "based upon information and belief [the purchaser's

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[2] Although Sun Valley involved the debtor's failure to obtain the stay, the reasoning is even more compelling where, as here, it is one of the creditors who fails to obtain a stay. The debtor in the instant case agreed to the lifting of the stay. See Order of Bankruptcy Court Approving Motion to Approve Stipulated Agreement Terminating Automatic Stay, filed May 21, 1991.

financing] was in the form of a note financed by Bank." Id. at 4. (Emphasis in original.) Again, Mr. Lopez cites to no authority, either in the record, or otherwise, to support his claim regarding the financing. Mr. Lopez makes other unverified and unsubstantiated claims that the purchaser should not be considered a good faith purchaser.

The Court finds that Mr. Lopez has not presented any facts in the record to support a finding that the purchaser was not a good faith purchaser. Mr. Lopez' failure to obtain a stay pending appeal has resulted in the sale of the collateral, which renders this appeal moot.

IT IS THEREFORE ORDERED that defendant-appellee Western Bank of Albuquerque, New Mexico's Motion to Dismiss Appeal of Andrew Leo Lopez, filed June 24, 1991 is granted.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:

ANDREW LEO LOPEZ, MBA, CPA,

Plaintiff-Appellant,

vs. CIVIL NO. 91-532-JP/RWM

DANIEL BEHLES, Trustee, for American Ready Mix, Inc., and Albuquerque Sand and Gravel, Inc., VAL & SONS, INC., VALENTIN TRUJILLO, and WESTERN BANK.

Defendants-Appellees.

ORDER

THIS MATTER comes before the Court upon Appellant Andrew Leo Lopez' Motion to Reconsider Appellee's Motion to Dismiss Appeal, filed January 16, 1992, the Court being fully advised, FINDS that the original Memorandum Opinion and Order, which held that Appellant's failure to obtain a stay of the Bankruptcy Court's Order allowing a lifting of the automatic stay resulted in the sale of the collateral, rendering this case moot, was correct.

IT IS THEREFORE ORDERED that Appellant's

Motion to Reconsider Appellee's Motion to Dismiss Appeal is denied.

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UNITED STATES DISTRICT JUDGE